

DEC 27 1983

No. 82-1724

LEONARD L. STEVENS
CLERK

In The
Supreme Court of the United States
OCTOBER TERM, 1983

STATE OF NEW YORK,

Petitioner,

vs.

ROBERT UPLINGER and SUSAN BUTLER,

Respondents.

**ON WRIT OF CERTIORARI TO THE
NEW YORK STATE COURT OF APPEALS**

**PETITIONER'S OBJECTION TO MOTION OF
CENTER FOR CONSTITUTIONAL RIGHTS AND
NATIONAL LAWYERS GUILD TO FILE BRIEF
*AMICUS CURIAE***

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Petitioner State of New York hereby respectfully files its objection, pursuant to Supreme Court Rule 36.3, to the motion made by the Center for Constitutional Rights and National Lawyers Guild for leave to file a brief *amicus curiae*. The motion and brief *amicus curiae* were received by petitioner on December 20, 1983. Consent to file a brief as *amicus curiae* had been requested of petitioner but refused on the ground that *amicus* had no concrete, substantial interest in the decision of the case.

Petitioner respectfully requests that the Court deny the motion for leave to file the brief *amicus curiae* because the Center for Constitutional Rights and National Lawyers Guild have no legitimate interest in the instant case as demonstrated

by the content of their proffered brief *amicus curiae*. This brief concentrates to a large extent on whether the State may outlaw homosexuality *per se*, as well as lengthy, historical discussions of various types of discrimination irrelevant to the instant case.

From a reading of petitioner's brief, it is clear that the right of individuals to engage in private, non-commercial consensual sodomy is not the issue before this Court. Nor is this Court called upon to decide in this case whether homosexuals are the object of discrimination based upon their sexual preference. Rather, the Court has before it for review a New York statute that criminalizes certain conduct, wholly unrelated to the sexual preference of the solicitor.

Moreover, the instant motion for leave to file a brief *amicus curiae* should be denied on the ground that in their brief the Center for Constitutional Rights and National Lawyers Guild have presented an adversarial, argumentative statement of the facts which is unjustified by the record in this case. On this ground alone, denial is warranted. Moreover, the proffered brief concentrates on the City Court decision to the complete exclusion of the decision of the state's highest court.

Finally, the issue of the claimed constitutional infirmities of the statute (e.g., violation of the First Amendment for overbreadth, vagueness, and underinclusiveness) has been well briefed by respondents Uplinger and Butler. Thus, the brief of *amicus curiae* will not assist the Court in any way in that it presents no relevant arguments or materials on the sole question to be decided, to wit, the constitutionality of New York Penal Law §240.35(3).

For all the foregoing reasons, petitioner respectfully requests this Court to deny the motion of the Center for Constitutional Rights and National Lawyers Guild for leave to file a brief *amicus curiae*.

Respectfully submitted,

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